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9 Attorneys for Plaintiffs  
THE FACEBOOK, INC and MARK ZUCKERBERG

15 THE FACEBOOK, INC. and MARK  
ZUCKERBERG.

18 Plaintiffs,

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18 CONNECTU, INC. (formerly known as  
19 CONNECTU, LLC), PACIFIC  
20 NORTHWEST SOFTWARE, INC.,  
WINSTON WILLIAMS, WAYNE CHANG  
and DAVID GUCWA.

21 Defendants

Case No. 5:07-CV-01389-RS

**OPPOSITION TO DEFENDANTS' CIVIL L.R. 6-3 MOTION FOR ORDER ENLARGING TIME TO OPPOSE PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

1        **I.        INTRODUCTION**

2        This case has been pending since August 2005. With the exception of Defendant David  
3        Gucwa (who is close to settlement), counsel for all Defendants is the same. Defendants have had  
4        every opportunity to seek discovery and articulate little, if any basis, concrete information they  
5        need to oppose Plaintiff Facebook, Inc.'s Motion for Summary Judgment ("MSJ"). In any event,  
6        this issue is better resolved in the context of the MSJ itself. For that reason, Defendants' Motion  
7        for Order Enlarging Time should be denied.

8        Defendants' motion does not explain why any of the additional discovery they describe is  
9        necessary to their ability to oppose the pending MSJ. In its MSJ, Facebook asks the Court to find  
10        that Defendants accessed, without permission, Plaintiffs' servers and data, took and/or used that  
11        information, and sent unsolicited emails to Facebook users inviting them to join Defendants'  
12        competing social network in violation of California Penal Code Section 502(c) and the Federal  
13        CAN-SPAM Act. With the exception of the declaration of Chris Shiflett, the entirety of the  
14        motion is premised on information from the Defendants or depositions where the defendants  
15        explored the exact issues used to support the motion. Plaintiffs have offered Mr. Shiflett for  
16        deposition on an expedited basis.<sup>1</sup>

17        Defendants' motion does not establish that additional time is required for relevant  
18        discovery. Instead, Defendants' motion asks the Court to indefinitely move the hearing on  
19        Facebook's MSJ so that Defendants may obtain discovery "to support summary judgment in  
20        favor of Defendants," permit them to assert "additional counterclaims against Plaintiffs," and  
21        exculpate them from claims not addressed in the MSJ. None of these objectives is relevant to  
22        opposing the MSJ or, as a result, the present Civ.L.R. 6-3 motion.

23        To ensure all the issues are fairly resolved at the same time, Facebook believes that the  
24        Rule 56(f) motion and the MSJ should be heard simultaneously and, for that reason, will file its  
25        opposition to the Rule 56(f) motion on January 23, 2008 (the same date that Defendants'  
26        opposition is due), so that the schedules can be coordinated.

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<sup>1</sup> Indeed, much of Mr. Shiflett's deposition is premised upon Defendants' code.

1           **II. DEFENDANT'S MOTION SHOULD BE DENIED**

2           A motion for an enlargement of time is appropriate only if the opposing party can show  
3           that denial of the request would result in substantial harm or prejudice to it. Civ.L.R. 6-3(a)(3).  
4           Defendants have not made such a showing. Defendants suggest that absent a continuance of the  
5           hearing on Plaintiff's MSJ, Defendants will be prevented from engaging in discovery necessary to  
6           their opposition.<sup>2</sup> 6-3 Mot. 3:22-27.

7           Defendants' Civ.L.R. 6-3 motion loosely describes discovery purportedly necessary to the  
8           preparation of an opposition and generally requests irrelevant and cumulative discovery. It  
9           admits that the discovery they seek is, instead, in support of their alleged potential counterclaims  
10           (*id.* 2:27-3:1), exculpation from liability for claims not subject to the MSJ (*id.*), and desire to  
11           better prepare defendants Chang and Gucwa (*id.* 3:16-21). Chang and Gucwa have been fully  
12           aware of this case and the issues for a long time and have chosen to do nothing. Overall, this case  
13           has been pending since August 2005. Nothing had prevented or is preventing Defendants from  
14           engaging in discovery on claims and defenses in this case. Defendants' dilatory decisions are not  
15           a proper basis to enlarge time under Civ.L.R. 6-3, and they should not be permitted to use this  
16           Rule to delay Facebook's hearing.

17           To the extent Defendants' Civ.L.R. 6-3 motion is directed toward discovery relevant to  
18           the pending MSJ, they have not made the requisite showing for Civ.L.R. 6-3. In support of its  
19           MSJ, Facebook submitted the Declaration of Chris Shiflett, who reviewed relevant portions of  
20           ConnectU's and Facebook's respective source codes and opined thereon. Doc. No. 253. In light  
21           of Mr. Shiflett's testimony, Facebook offered to make him available for deposition on an  
22           expedited basis.<sup>3</sup> Decl. of Theresa Sutton in Opp'n to 6-3 Mot. to Enlarge Time ("Sutton Decl."),

23  
24           <sup>2</sup> While Defendants' 6-3 Motion purports to request a delay of the hearing on the MSJ, their  
25           proposed order suggests otherwise. The proposed order asks that the Court take Defendants' Rule  
26           56(f) Motion off calendar. Plaintiffs do not oppose this request. Plaintiffs also ask the Court to  
27           set a briefing schedule and hearing date for "mutual motions for summary judgment." Defendants  
28           have not filed a motion for summary judgment, so it is unclear what this is a reference to. If Defendants are suggesting that Plaintiff's Motion should be delayed until Defendants file a motion, such a request should be denied. Nothing in the present Civ.L.R. 6-3 motion supports this request.

<sup>3</sup> Mr. Shiflett is available in New York on January 22-25 and January 29. Mr. Shiflett is willing, though it is less convenient for him, to travel to California for a January 21 deposition.

1 ¶ 6. Defendants ignored this offer. Defendants also have not explained why any other deposition  
2 is necessary or what additional information they need to prepare their opposition.

3       **A. Defendants Were In Possession of All of The Materials Supporting**  
4       **Facebook's MSJ**

5       **1. Evidence in Support of Motion for Partial Summary Judgment**

6       Defendants complain that Facebook submitted approximately 60 exhibits in support of its  
7 motion and that Defendants need time to “digest” this information. 6-3 Mot. 3:12-15. Forty-  
8 three of the documents originated with Defendants and include their written discovery responses,  
9 declarations, and documents produced in response to document requests. Sutton Decl. ¶ 7.  
10 Eleven of the documents are excerpts from depositions attended by Defendants’ counsel. *Id.*  
11 Nothing in these exhibits is new to Defendants.

12       **2. Chris Shiflett’s Declaration**

13       Defendants argue that an enlargement is appropriate because they need to review three of  
14 six exhibits attached to Mr. Shiflett’s Declaration and take his deposition. 6-3 Mot. 3:12-14. As  
15 noted above, Mr. Shiflett is available in short order for a deposition. Sutton Decl. Ex. A.

16       Defendants incorrectly contend that three exhibits identified by Mr. Shiflett were never  
17 produced before. *Id.* at 9-11. To the contrary, the materials were, in fact, produced a year and a  
18 half ago (and, of course, were attached to Mr. Shiflett’s Declaration).<sup>4</sup> Doc. No. 253, fn 2; Sutton  
19 Decl. Ex. B. These three exhibits contain Facebook source code that shows Plaintiffs’  
20 “countermeasures” against Defendants’ attacks on Plaintiffs’ servers and user base. *Id.* ¶ 3.  
21 Facebook isolated them from the rest of the code and produced them separately so that  
22 Mr. Shiflett could easily refer to them in his Declaration. Again, these documents are not new to  
23 Defendants.

24       **3. Mark Zuckerberg’s Declaration**

25       Defendants also contend that they need additional time to depose Facebook’s “factual  
26 declarant,” Mark Zuckerberg. 6-3 Mot. 3:12-15. ConnectU deposed Mr. Zuckerberg in April

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<sup>4</sup> These documents are part of the production of “80 documents” about which Defendants  
28 complain occurred two days after the MSJ was filed. 6-3 Mot. 1:27-2:1. The remaining  
documents in this production are electronic communications that include discussions about  
Facebook’s servers. They are irrelevant to Defendants’ opposition. Sutton Decl. ¶ 8.

1 2006. Sutton Decl. ¶ 12. ConnectU fully explored the issues present in the MSJ. *Id.* Despite  
2 having successfully moved to compel a continuance of that deposition in January 2007, ConnectU  
3 has never re-noticed it. *Id.* ConnectU's delays should not prejudice Facebook. In any event,  
4 Defendants' 6-3 Motion does not articulate what testimony has not already been elicited from  
5 Mr. Zuckerberg that is necessary for preparation of their opposition to the MSJ.

6 **B. The Currently Scheduled MSJ Hearing Should Not Be Delayed So**  
7 **Defendants Can Review "Recently-Produced" Hard Drives and Perform**  
**"Follow up" Discovery**

8 Defendants make a number of arguments related to recent document production.  
9 Plaintiffs have produced all responsive documents requested in this action. Sutton Decl. ¶ 8.  
10 Defendants' remaining arguments regarding discovery are largely related to discovery unrelated  
11 to Facebook's MSJ or discovery in the Massachusetts action.

12 **1. The "Recently-Produced" Hard Drives**

13 Defendants make reference to the "recently produced hard drives."<sup>5</sup> 6-3 Mot. 2:24-27.  
14 These so-called "recently-produced hard drives" identified by Defendants belonged to the early  
15 Facebook principals, and were produced in the related Massachusetts action pursuant to a largely  
16 agreed upon Stipulated Protocol to extract source code.<sup>6</sup> Sutton Decl. Ex. C. Defendants have  
17 not propounded any document requests in this action directed to collection of hard drives or the  
18 source code at issue in Massachusetts. As a result, their argument that the production of these  
19 drives was in response to "requests propounded in 2005" (6-3 Mot. 2:24-25) is irrelevant and  
20 misleading, because those requests were not served in this case. Further, the Protocol pursuant to  
21 which Facebook produced the 15 hard drives permits ConnectU's expert to extract only Facebook  
22 source code, Harvard Connection source code, and code related to two early projects Mark  
23 Zuckerberg worked on – coursematch and facemash. Sutton Decl. ¶¶ 10-11 and Ex. C, ¶¶ 4-5.  
24 The Protocol does not permit the expert to extract or analyze any other data. *Id.* Defendants'  
25 suggestion, therefore, that the requested delay will permit them to "fully analyze these hard

26 <sup>5</sup> Defendants also state they need a 30(b)(6) deposition and suggest it is related to the materials  
27 from the hard drives. No such 30(b)(6) notice has been served and, for the same reasons  
discussed below, Defendants' argument fails.

28 <sup>6</sup> The portions of the Protocol that were not stipulated dealt with the mechanics of the Protocol  
itself.

1       “drives” is incorrect. 6-3 Mot. 3:4-6. At most, Defendants will have access to certain kinds of  
2       source code and nothing else.

3                   **2.       “Key Evidence” On the “Recently Produced” Hard Drives**

4       Defendants erroneously argue that Plaintiffs hid evidence that was found on the “recently  
5       produced” hard drives, which allegedly “suggests that Plaintiff Mark Zuckerberg attempted to  
6       hack into Defendant’s website.” 6-3 Mot. 3:1-4. This argument is irrelevant. Defendants’  
7       attempt to smear Mark Zuckerberg could only be used to support an unclean hands theory and has  
8       no relevance to the actual issue of liability under the two asserted statutes. This is in part because  
9       unclean hands is not an available defense to a statutory violation. *Lass v. Eliassen*, 94 Cal.App.  
10      175, 179 (1928), cited in, *Timberline v. Jasinghani*, 54 Cal. App.4th 1361, 1368 (1997); *see also*  
11      *Estate of McInnis v. Smith*, 182 Cal. App. 3d 949, 958. In any event, whatever Defendants’ claim  
12      may be, it does not go to any of the issues raised in the summary judgment motion.

13                   **III.      CONCLUSION**

14       For the foregoing reasons, Defendants’ request to delay a hearing on Facebook’s Motion  
15       for Partial Summary Judgment should be denied. Plaintiffs further request that the Court to  
16       schedule Defendants’ 56(f) Motion for the same day as the hearing on Facebook’s Motion for  
17       Summary Judgment (February 13, 2008), with briefing to comply with applicable Federal and  
18       Local Rules.

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20       Dated: January 14, 2008

ORRICK, HERRINGTON & SUTCLIFFE LLP

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**CERTIFICATE OF SERVICE**

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on January 14, 2008.

Dated: January 14, 2008.

Respectfully submitted,

/s/ Theresa A. Sutton /s/  
Theresa A. Sutton